

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG TERRELL YOUNG,

Defendant-Appellant.

UNPUBLISHED

August 26, 2003

No. 238742

Saginaw Circuit Court

LC No. 01-020422-FC

Before: Hoekstra, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of assault with intent to do great bodily harm, MCL 750.84, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to seventy-six months to ten years in prison and thirty-eight months to five years in prison for the assault with intent to do great bodily harm convictions, consecutive to two years in prison for the felony-firearm conviction. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Facts

During the early hours of July 20, 2001, at an event in downtown Saginaw known as the “Pub Crawl,” a group of police officers assigned to crowd control duty were standing across from the Mirage and El Farolito Restaurant, which were next to each other. A woman approached one of the officers and told him there was going to be a fight in front of the El Farolito Restaurant. Meanwhile, the victim was standing in line in front of the Mirage when he heard an argument behind him. He turned and saw defendant with three other men, all of whom the victim recognized. One of the men threw a bottle into the crowd and then nudged defendant. Defendant pulled a gun out of his pocket. As the victim began to run away, he heard three gunshots and was struck him in the leg with a bullet. In contrast to the victim’s testimony, defendant testified that he saw a man named Tory Hammer, who accompanied him to the “Pub Crawl,” firing a gun outside of the Mirage.

At the time the shots were fired, officers were attempting to cross the street to investigate the report that there was going to be a fight in front of the El Farolito Restaurant. After the shots were fired, the crowd of hundreds which was gathered in front of the Mirage began to disperse. Officer Al Fong saw defendant run from the crowd and noticed that defendant had a gun in his

hand. Defendant, on the other hand, testified that he did not have a gun with him. Officer Fong pursued defendant. Officers Anthony Teneyuque and Donald Simpson also noticed defendant run from the crowd and joined the pursuit. Defendant testified that he had started running after he saw Hammer fire the gun. Defendant testified that Hammer ran beside him as he ran. According to Officers Fong, Teneyuque, and Simpson, defendant reached over his shoulder and fired at Officer Fong. Officer Fong returned fire, releasing three rounds. Officer Teneyuque drew his weapon and fired one shot, hitting defendant. Defendant fell and dropped his gun. Officer Fong spotted the gun on the ground near defendant and stepped on it to keep it secure while Officer Simpson handcuffed defendant. Officer Fong picked up the gun and put it in his duty belt as the crowd became unruly and began to jeer and throw bottles at the officers. Five minutes later, Officer Fong gave the gun to Officer Larry Rodriguez.

An expert from the Michigan State Police Crime Lab testified that no fingerprints were found on the gun. She also testified that handling a gun with bare hands and walking around with it on a belt could have wiped off any prints.

II. Testimony of Tory Hammer's Existence

At trial, Detective Derek Peters offered testimony to show that the Tory Hammer defendant referred to in his testimony did not exist. The testimony shows that Detective Peters used several avenues to locate Hammer: (1) searching the Secretary of State records, (2) searching records from Saginaw high schools, (3) searching the city water department records, and (4) asking the city clerk for Hammer's birth certificate or any civil lawsuit filing. Defendant argues that Detective Peters' testimony was hearsay, without the foundational requirements for any exception to the hearsay rule. Furthermore, that the admission of this testimony denied defendant a fair trial and violated his right to confrontation.

Since defendant did not object to Detective Peters' testimony, this issue is not preserved for appeal. Therefore, defendant must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

There is overwhelming evidence that supports defendant's conviction without Detective Peters' testimony. The victim testified that he recognized defendant and that defendant had a gun and had shot him. Additionally, all of the police officers who chased defendant testified that defendant fired a gun at Officer Fong during the chase. We therefore conclude that, even assuming that Detective Peters' testimony regarding the existence of Hammer was inadmissible hearsay, the admission of this testimony did not affect defendant's substantial rights.

III. Ineffective Assistance of Counsel

Defendant next contends that he was deprived of the effective assistance of counsel due to his attorney's failure to object to Detective Peters' alleged hearsay testimony. In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate

review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). “If review of the record does not support the defendant’s claims, he has effectively waived the issue of effective assistance of counsel.” *Sabin, supra* at 659. In the present case, defendant failed to move in the trial court for an evidentiary hearing or a new trial. Therefore, our review is limited to the facts on the existing record.

To establish ineffective assistance of counsel, a defendant must show that: (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms, and (2) the representation was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich App 281, 302; 613 NW2d 694 (2000). In applying this test, the reviewing court begins with the premise that counsel’s conduct falls within the wide range of reasonable professional assistance, and defendant bears the heavy burden of proving otherwise. *People v Mitchell*, 454 Mich App 145, 156; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). In evaluating claims of ineffective assistance of counsel,

a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [*People v Reed*, 449 Mich 375, 400-401 (Boyle, J.); 535 NW2d 496 (1995), quoting *Strickland v Washington*, 466 US 668, 697; 104 S Ct 2052; 80 L Ed 2d 674 (1984), on remand 737 F2d 894 (CA 11, 1984).]

Such is the case presented in this appeal. Even if we assume counsel erred, plaintiff has failed to establish sufficient prejudice to warrant a new trial. As discussed in Part II of this opinion, the admission of Detective Peters’ testimony did not affect defendant’s substantial rights because the other evidence against him was overwhelming. Similarly, defendant was not deprived of the effective assistance of counsel because the alleged error was not prejudicial.

IV. Failure to Preserve Exculpatory Evidence

Finally, defendant argues that he was denied his state and federal constitutional right to due process of law because the police negligently failed to preserve exculpatory evidence. Defendant claims that the police destroyed the fingerprints on the gun which would have exonerated him. A defendant seeking appellate relief on the ground that his or her due process rights were violated because the police failed to preserve evidence “bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith.” *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Defendant concedes that this issue was not preserved. Therefore, defendant must show plain error that affected substantial rights. *Carines, supra* at 774.

Defendant argues that the police acted in bad faith by negligently handling the weapon found near defendant. Defendant claims the police actions exemplify that of a “willful rendering of imperfect performance.” However, the testimony shows that the officers were dealing with an

angry mob which began to yell and throw bottles. In order to secure the gun and protect himself and others, Officer Fong had to immediately secure the weapon. Defendant fails to show that this amounted to bad faith on behalf of the police. Officer Fong was simply acting as any reasonable police officer would act in such a situation. Defendant also presents no evidence that someone else's fingerprints were on the gun or that the evidence was exculpatory. Thus, by failing to show that the police acted in bad faith or that the evidence was exculpatory, defendant has not met his burden. *Johnson, supra* at 365.

Affirmed.

/s/ Joel P. Hoekstra

/s/ David H. Sawyer

/s/ Brian K. Zahra